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October 11, 2016

VIA FIRST CLASS MAIL

Ms. Rachel Dickon
Assistant Secretary of Federal Maritime Commission
800 North Capitol St.
Room 1046
Washington, D.C. 20573

Re: Docket No. 15-11 – Ovchinnikov v. Hitrinov

Dear Ms. Dickon:

Enclosed for filing in the above-captioned matter are an original true copy and five (5) additional copies of:

1. Exceptions of Respondents' Counsel to the Presiding Officer's September 16 Decision not to Consider Disciplinary Action Against Complainants' Counsel

If you have any questions, please do not hesitate to contact me.

Best regards,

Eric Jeffrey

Enclosures

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 15-11

IGOR OVCHINNIKOV, ET Al
v.
MICHAEL HITRINOV ET AL

Consolidated With
DOCKET NO. 1953(I)

KAIRAT NURGAZINOV, ET Al
v.
MICHAEL HITRINOV ET AL

EXCEPTIONS OF RESPONDENTS' COUNSEL TO THE PRESIDING OFFICER'S SEPTEMBER 16 DECISION NOT TO CONSIDER DISCIPLINARY ACTION AGAINST COMPLAINANTS' COUNSEL

The undersigned, Counsel for Respondents Empire United Lines and Michael Hitrinov (collectively Empire) hereby files exceptions to the September 16, 2016 decision of the Presiding Officer denying, without addressing the merits and without prejudice to raising the matter elsewhere, my motion requesting that the Presiding Officer commence a disciplinary proceeding to consider substantial violations by Counsel for Complainants of the ethical requirements of Federal Maritime Commission (FMC) Rule 26, 52 CFR 502.26. It is the undersigned's position that the Presiding Officer should have considered the facts set forth in the motion and should have taken appropriate disciplinary action based thereon -- most sensibly issuance of an order requiring Complainants to show cause why they should not be disciplined. Under the

circumstances, I believe that the proper administration of justice warrants the Commission passing on the matter itself, rather than remanding it to the Presiding Officer.

I. INTRODUCTION

The opportunity to practice law before the Commission is a privilege, not a right. As a condition of that privilege, FMC Rule 26 requires attorneys practicing before the Commission to adhere to specified rules of conduct and practice:

> "[a]n attorney practicing before the Commission is expected to conform to the standards of conduct set forth in the American Bar Associations Model Rules of Professional Conduct as well as the specific requirements of this Chapter." 46 C.F.R. 502.26.

One of the requirements to which those practicing before the FMC are subject is the obligation to report certain types of transgressions to the Commission, in order to protect the public. Model Rule 8.3(a) & Comment 1 thereto ("Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct"). The FMC's Rules do not, however, specify a procedure by which counsel are expected to discharge this obligation.

It may well be appropriate for the FMC to amend its rules to add specific procedures for reporting misconduct. Until then, however, it appears to the undersigned that the appropriate procedure is to bring the matter to the attention of the Presiding Officer, as advised by the Office of the Secretary, and for the Presiding Officer to issue an appropriate order or Recommended Decision, subject to review by the Commission.

II. BACKGROUND AND PROCEDURAL HISTORY

Although the particular nature of the underlying proceeding has no effect on the ethical issues raised herein, a brief and simplified recitation of the fundamental facts may provide useful context. At issue in the proceeding is whether Complainants, who had absolutely no role in the transportation contract – being neither shippers nor consignees – and who did not pay the ocean freight, are nevertheless entitled to assert claims relating to Respondents' alleged failure to deliver certain vehicles to them (rather than to the named consignee). Complainants allege in their Complaint that they bought certain vehicles from one of a group of companies collectively referred to as Global (each subsequently found by the district court in New Jersey to be alter egos of one another and of Mr. Sergey Kapustin and certain other individuals, and together a single RICO enterprise). It was Global's responsibility to transport the vehicles to Finland, where another Global entity would collect the vehicles and deliver them to Complainants (after payment of any amounts still due to Global, such as ocean freight and destination terminal charges).

Global was party into a rather complicated arrangement with Empire covering these cars and many others, the exact parameters of which are matters of dispute. In the view most favorable to Complainants, Global retained Empire, acting in its capacity as an NVOCC,[1] to transport containers containing the Global vehicles (often along with other vehicles) from New Jersey to Kotka, Finland, where the containers were to be delivered to the consignee -- a warehouse company known as CarCont Ltd.. There, CarCont would de-containerize the Global vehicles for pickup by a Global entity (found part of the conspiracy) named Global Cargo Oy. Global Cargo Oy, in turn, would – we assume -- arrange for delivery of the vehicles to the

[1] One of the matters in dispute is whether Empire, which had a 60 percent equity interest in the vehicles pursuant to its financial arrangement with Global, was acting as a beneficial cargo owner or in its capacity as an NVOCC when it purchased transportation services from the vessel-operating common carrier (MSC).

pertinent Global customers. Complainants are not named on any of the transportation documents issued either by Empire or by the underlying ocean carrier (MSC) – which list Empire as the Shipper and CarCont as the Consignee – and indeed were unknown to Empire until well after the transportation took place. Because Global declined to pay certain amounts due to Empire and did not request release of the vehicles at issue (and other vehicles shipped pursuant to the same arrangement), as required under the transportation arrangement between Global and Empire, the vehicles were eventually liquidated in Finland – some by Empire to cover the amounts due from Global and the other by CarCont to cover unpaid storage charges due from Global.

Complainants filed their Complaint against Respondents on November 12, 2015, through Counsel Marcus Nussbaum and Seth Katz. From the beginning, Messrs. Katz and Nussbaum had difficulty complying with the FMC's Rules. Rather than limit the Complaint to claims, if any, that might possibly be grounded in fact and law, as required by FMC Rule 6(a), Complainants' Counsel chose to file a shotgun Complaint asserting that Respondents violated nearly every prohibition in the Shipping Act, including some that could not conceivably apply. For example, despite identifying Empire as an NVOCC (correctly under its view of the facts), Counsel nevertheless asserted claims under provisions of the Shipping Act that do not apply to NVOCCs, including provisions limited, respectively, to marine terminal operators and controlled carriers.[2] Likewise, Complainants' Counsel asserted claims about charges allegedly not in accordance with the tariff, even though the charges were neither assessed against nor paid by Complainants, and even though their theory of injury had nothing whatsoever to do with the rates

[2] Complainants have since abandoned all but one, or possibly two, of their claims in the face of Respondents' pending Motion for Judgment on the Pleadings based on lack of subject matter jurisdiction, lack of standing, and failure to state a claim. Briefing on that Motion was completed July 26, 2016, and it is currently awaiting decision (although we understand that the Presiding Officer may request additional briefing).

at which the vehicles moved. Their very first motion was improperly filed by email, and properly rejected.

On July 13, 2016, Mr. Sergey Kapustin, head of the Global companies, filed a motion, on behalf of himself and his Global companies, seeking to intervene in this proceeding for purposes of moving to disqualify Mr. Nussbaum (his and Global's former counsel), on grounds of conflict of interest because Mr. Nussbaum had represented Global in litigation involving these very same vehicles and was using confidential information obtained through that representation to prosecute the instant proceeding. That motion is currently pending before the Presiding Officer

I present below the highlights of the further violations of the FMC Rules, and more importantly the Model Rules of Attorney Conduct, committed by Counsel for Complainants during the rest of the proceeding to date. Suffice it to say here that these include knowing submission of falsified evidence, providing false/misleading statements to the Presiding Officer, and the repeated filing of improper replies without leave to do so or even a request for such leave. The undersigned eventually and reluctantly decided that his obligation under Model Rule 8.3(a) required him to bring the misconduct to the attention of the Commission.[3]

As it was unclear from the Commission's Rules exactly how to raise a matter of ethical misconduct, the undersigned inquired of the Office of the Secretary (without reference to this proceeding) as to the manner by which questions of attorney conduct might appropriately be brought before the FMC. The answer I received was that the proper place to start was by a motion addressed to the Presiding Officer. The Secretary's Office did not, however, have any

[3] Please note that the undersigned (in his role as an FMC attorney subject to Rule 26), was solely responsible for that motion, and is solely responsible for these Exceptions The duty to report misconduct falls on me, not Respondents, and it is Nixon Peabody, not Respondents, that is bearing the entire cost and burden of the motion and Exceptions.

advice on what type of motion should be brought, given the absence of any known precedent. Accordingly, on September 7, 2016, the undersigned filed the type of pleading typically used in federal district court for such matters – a Motion for an Order to Show Cause Why the Commission should not Revoke Complainants' Counsel's Privilege of Practicing before the Commission. I there set out, in the level of detail possible for a 10-page motion, the specific Model Rules and Commission Rules that Complainants' Counsel had violated, along with a specific legal and factual analysis for each alleged violation.

The next day, Complainants filed their own cross-motion complaining of the undersigned. As that pleading is not at issue in these exceptions, suffice it to say that it failed to cite a single Model Rule or Commission Rule, and relied on vague, blunderbuss allegations of wrongdoing and mental incapacity, rather than any specific factual support.

On September 16, 2016, the Presiding Officer issued the decision here at issue. In brief, he denied both motions without prejudice, concluding that because both sides suggested remedial action extending beyond the instant matter, it was not within his power to address the ethical concerns raised by the motions. He suggested that such matters should be addressed directly to the Commission, but did not identify a mechanism for so doing.[4] These exceptions followed.

[4] The Presiding Officer also suggested that the appropriate entity to which to report misconduct occurring before the FMC is the state bar in which the attorney is licensed, and that such reporting is mandatory. I believe that to be contrary both to FMC Rule 26 and to the Model Rules, as well as inconsistent with the procedure of state associations. The requirement to follow the Model Rules is imposed by the FMC, not state bar associations, which in most cases have their own, individual rules of conduct, even if similar to the Model Rules. So unless Rule 26 is merely precatory, a matter I return to below, then it would seem incumbent upon the Commission, not state bars, to enforce the Rule's prescriptions and proscriptions. Likewise, the Model Rules require counsel in FMC proceedings to report misconduct to the appropriate authority, which would most reasonably seem to be the authority imposing the requirement – i.e., the FMC. Finally, in my understanding, state bars are typically concerned with conduct within

III. ARGUMENT

We show below that: (1) exceptions at this stage are an appropriate means by which to raise the matter for review by the Commission; (2) the Presiding Officer did have authority to rule on the Motion for Order to Show Cause, and even if not, the Commission should rule on the matter *ab initio*; (3) Counsel for Complainants have repeatedly violated both the Model Rules and the Commission's Rules; and (4) the Commission should itself resolve the issues, and any appropriate disciplinary action, without expending the time and resources to remand the matter to the Presiding Officer.

A. Exceptions Are Appropriate To Bring The Matter Before The Commission

Exceptions are usually available as of right only for appeal of: (i) an Initial or Recommended Decision, (ii) dismissal of a complaint in whole or in part, and (iii) denial of a motion to intervene. FMC Rule 227. Other orders that may be issued by a Presiding Officer in the course of a proceeding are normally considered interlocutory, and thus appealable only in connection with exceptions to the Initial or Recommended Decision (or with leave of the Presiding Officer).

Although the question as to exactly how ethical violations may be raised at the FMC is currently table rasa, we believe that, in the absence of a defined procedure for filing ethical complaints, a Presiding Officer's ruling on a motion for disciplinary action should be treated as final for purposes of permitting/requiring the filing of exceptions. Any such ruling is purely collateral to, and effectively independent of, the proceeding on the merits. Indeed, as evidenced

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their jurisdictions, and take notice of extra-jurisdictional activity only after disciplinary action has been taken by the jurisdiction in which the ethical violations occurred.

by the fact that the motion was made in my name, rather than that of Respondents, it is really a conflict between counsel, rather than the parties. See n. 3, above.

The need to treat such rulings as final is obvious if one considers a possible different ruling by the Presiding Officer. Had the Presiding Officer determined that he did have jurisdiction and suspended the privilege of Complainants' Counsel to practice before the Commission, it seems clear that Mr. Nussbaum and Mr. Katz would have had a right of immediate appeal. Nor can it be well argued that an order declining sanctions is without immediate effect. One of the primary purposes of the Model Rules and the obligation to report certain conduct is to ensure protection of the litigating public. It cannot be gainsaid that allowing a person to continue practicing before the Commission (potentially for years) even though he or she has committed serious violations of the Model Rules and Commission Rules is likely to harm the Commission and those who come before it.

B. Either The Presiding Officer Had, Or The Commission Now Has, Jurisdiction To Rule On Discipline

As summarized above, the Presiding Officer held that he did not have jurisdiction to rule on the motion because it requested relief that extended beyond the particular proceeding before him, finding that such claims should be raised, even as an initial matter, directly before the Commission. We understand why the Presiding Officer would be reluctant to become embroiled in such a matter with implications beyond the specific case. But even apart from the fact that the Presiding Officer might have limited any sanction to the case before him, and the apparent

conflict with the Office of Secretary, I believe that the Presiding Officer was in this respect incorrect.[5]

In the federal court system, it is long established that the courts have inherent authority to discipline attorneys appearing before them. *See Ex Parte Burr*, 22 U.S. 529, 531 (1824). It is equally axiomatic that this disciplinary authority includes the power of a court to issue sanctions broader than the case before it. The ABA's Model Rules of Disciplinary Enforcement (Rule IV), for example, state:

> "For misconduct defined in these Rules, and for good cause shown, and after notice and opportunity to be heard, any lawyer admitted to practice before this Court may be disbarred, suspended from practice before this Court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant."[6]

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[5] In opposing the undersigned's motion, Counsel for Complainants took the position that Rule 26 was merely a suggestion (akin to a town hall moderator asking the candidates to play nice), and that the Commission has no authority to prevent them from practicing before the FMC as long as they remain licensed by at least one state. See Complainants' September 8, 2016 Cross-Motion for an Order to Show Cause. I disagreed then and I disagree now that Rule 26 is simply precatory and toothless. See Respondents' September 14, 2016 Response to Complainants' Motion for an Order to Show Cause. Moreover, Complainants' Counsel entirely undercut their own argument when they found a sufficient basis in law and fact to file their own motion for suspension of the undersigned.

[6] The Rules of the U.S. District Court for the Western District of Washington, for example, provide:

"(4) Types of Discipline. Discipline may consist of one or more of the following:
(A) disbarment from the practice of law before this court.
(B) suspension from the practice of law before this court for a specified period;
(C) interim suspension from the practice of law before this court, defined as the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Examples of situations in which the court will consider interim suspension include:
(i) suspension upon conviction of a serious crime, or
(ii) suspension when the lawyer's continuing conduct is likely to cause immediate and serious injury to a client or the public;
(D) reprimand, defined as a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice before this court;

When ethical violations are brought to the attention of a federal district court judge, they generally either refer the matter to a panel or committee set up for that purpose or address it themselves (often by use of an order to show cause). See, e.g., *MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 138 F.3d 33, 37 (2d Cir. 1998) (stating that a district court judge may deal directly with an ethical violation or refer it to the applicable council or both); *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120, 146 (W.D. La. 1989) (inherent powers employed to sanction an attorney and to send a copy of the opinion to state bars where the attorney was licensed).

Moreover, the immediate effect of any disciplinary action by a Presiding Officer – including one with extra-proceeding application – is considerably moderated by the Rules of the Commission and may be entirely ameliorated by the Presiding Officer until the Commission itself gets a chance to make the final decision. Under the FMC's Rules, any decision by the Presiding Officer imposing discipline would become "inoperative" as soon as the subject(s) of the disciplinary action filed timely Exceptions. Rule 227(a)(5). And even that potential gap of up to 22 days could be eliminated by the Presiding Officer -- who could, among other things, suspend the effectiveness of the order, either as to other proceedings or *in toto*, until the time for filing Exceptions had run. The Commission could, should it so choose, require such suspension, either by rule or by its decision in this matter.

As explained above, the Presiding Officer here suggested that ethical matters, or at least those potentially affecting more than one proceeding, should be brought originally to the Commission itself. There does not appear to be a suitable procedure for requesting such exercise

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> (E) admonition, defined as a form of non-public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice before this court . . . ."

of original jurisdiction. Filing a Petition pursuant to Rule 76 appears theoretically possible, although it seems hardly reasonable to require that attorneys to FMC proceedings use a procedure under which they would need to pay $289 from their own pockets to discharge the Commission-imposed obligation to report misconduct. From an administrative standpoint, however, it appears terribly inefficient to start at the top, when it is the Presiding officer who is more familiar with the facts of the proceeding as to which violations are alleged, and when in some cases the Commission is likely to send the matter down to an Administrative Law Judge for initial development of the facts (by show cause order or otherwise).

If, however, the Presiding Officer is correct as to where the ethical matter should be raised, then the undersigned submits that the Commission now has jurisdiction to address the matter, just as it would have jurisdiction over a Petition. It would strain credulity, not to mention Commission Rule 1, to exalt form over substance by requiring the filing of a Petition setting forth the same information as is set forth herein, especially given the lack of clarity in the Commission's Rules.[7]

C. Complainants' Counsel Have Repeatedly Violated Both The Model Rules And The Commission's Rules

We show in this section of the Exceptions that Counsel for Complainants have engaged in: (i) violations, some repeated, of multiple portions of the Model Rules, and (ii) multiple violations of several of the Commission's own Rules. Because the Model Rules set forth ethical, rather than procedural, requirements, we address those first. Finally, while not specifically constrained by the Model Rules or Commission Rules, we comment on the extreme level of incivility displayed by Counsel for Complainants.

[7] If the Commission thinks necessary, the undersigned/Nixon Peabody will pay the $289 fee.

1. Violations of the Model Rules

We demonstrate below that Counsel for Complainants have engaged in multiple and continuing violations of the ABA's Model Rules of Professional Conduct. Although we mostly cite to the Docket (by date and title) for pleadings and materials submitted in the proceedings below, for the convenience of the Commission, we attach hereto some of the principal documents relevant to the substance of the violations.

a. Violations of Model Rules 3.3(a)(3) & 3.4(a)

Model Rule 3.3(a)(3) provides that:

> "a lawyer shall not knowingly: . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

Model Rule 3.4(a) likewise states that "[a] lawyer shall not . . . unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."

Complainants' Counsel – Messrs. Nussbaum and Katz – have repeatedly violated both these Rules by submitting and relying upon documents they knew to be falsified, and by failing to remedy the falsity.

On April 27, 2016, the Presiding Officer ordered both Parties to produce certain "shipping documents," including the invoices that Empire sent to Global for transportation of the four vehicles at issue. Attached hereto as **Appendix A** are sets of the four Empire invoices to Global – one for each vehicle. In each case, the first document in the set is the invoice Empire actually sent to Global, exactly as it was sent,

and the second is the very same invoice as produced and repeatedly referenced by Complainants' Counsel.[8]

It does not take a forensics expert to see that the documents produced by Complainants' have been heavily doctored from the originals. In particular, there are four obvious alterations fabricated after the invoices left Empire: (i) Empire letterhead was added to what was originally a plain email, (ii) the invoice number was enlarged and moved to appear as a heading, (iii) the invoices were stamped as "paid," and (iv) Mr. Hitrinov's sensitive banking information was added at the top.

Mr. Nussbaum's knowledge of and role in this fabrication is readily apparent. He was counsel to Global at the time the ***original*** invoices were sent by Empire and received by Global, and he has used the ***doctored*** invoices he obtained through his position at Global in multiple proceedings. Moreover, as stated in the Affirmation of Jon Werner, attached as **Appendix B**, the template for this fraudulent activity was found during the course of discovery in federal district court litigation on a related matter to reside on Global's computer system. Indeed, Mr. Kapustin himself has stated under oath that Mr. Nussbaum participated in – indeed masterminded – the creation of these fabrications.[9]

Even if one were to engage in the dubious, benefit of any doubt, assumption that Complainants' Counsel did not know of the falsity of the fabricated invoices when they first submitted them to the Presiding Officer, Counsel certainly knew better when they continued to

[8] Complainants' Counsel cannot seek to shift the blame for this to their clients, as they have made a claim of attorney-client privilege for the native originals, which can only mean that the documents were sent ***by Counsel to Complainants***, and not the other way around.

[9] July 13, 2016 Affirmation of Mr. Sergey Kapustin (Kapustin Aff.) Para. 38. Respondents do not vouch for Mr. Kapustin's testimony, as he has defrauded both his customers and the courts, as well as Empire. Given Mr. Nussbaum's prior attorney-client relationship with Global/Mr. Kapustin, however, we do find this statement at least somewhat telling when added to the other evidence.

rely upon the doctored documents after Respondents demonstrated the falsity of the invoices in their Motion to Strike Complainants' "Shipping Documents" filed on June 22, 2016. Since that time, Messrs. Nussbaum and Katz have continued to cite these documents without any caveat regarding their falsity.[10] Furthermore, once the falsity of the invoices was demonstrated, Complainants' Counsel were required by Model Rule 3.3(a)(3) to take remedial measures, but they have chosen not to comply with that ethical requirement.

b. <u>Violations of Model Rule 3.3(a)(1)</u>

Model Rule 3.3(a)(1) provides that:

> "a lawyer shall not knowingly: . . . make a false statement of fact or the law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer ."[11]

As explained in the Comments, this is intended to "avoid conduct that undermines the integrity of the adjudicative process" and a lawyer's duty to represent the client "is qualified by the advocate's duty of candor to the tribunal." Comment 2.[12]

During the proceedings below, Mr. Nussbaum knowingly misrepresented his whereabouts to the Presiding Officer and to Respondents in order to help him gain an extension of 20 days to respond to the Motion to Intervene filed by his former client, Mr. Kapustin. On

[10] See, e.g., Complainants' August 9, 2016 Reply on Supplementation of the Record; Complainants' August 24, 2016 Motion for Leave to File Sur-Reply to Respondents' Motion for Judgment on the Pleadings.

[11] Such action would also appear to violate Model Rules 4.1(a) (making a false statement of material fact), 8.4(c) (engaging in conduct involving dishonesty or misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice).

[12] Although we do not address the matter in detail, we note that Complainants' Counsel have also violated this rule by misrepresenting quotations, through clever excision, deletion or otherwise, in order to change the apparent meaning of the quote or to disguise that the origin of the quote was not from the court. See, e.g., Respondents' August 9, 2016 Reply to Complainants' Response to the Presiding Officer's Order to Supplement the Record.

July 18, after refusing to give Counsel for Respondents any reason why he was moving for an extension, Mr. Nussbaum stated in his motion only this:

> "On the date the motion was filed, the undersigned was traveling overseas in order to attend to a family matter, with limited access to email. This fact has already been acknowledged by counsel for the Respondents, who on July 14, 2016 provided the Secretary and the Presiding Officer with a copy of the undersigned's 'Out of Office Auto-reply', which explained that the undersigned's law office '…will be closed from July 13, 2016 through August 11, 2016.'"[13]

On July 21, 1916, after Respondents filed a response questioning why Complainants needed so long if Counsel was, as appeared, no longer overseas, Mr. Nussbaum asserted for the first time that he was in Israel on a family matter. Respondents thereupon consented to, and the Presiding Officer granted, the requested extension.

As it turns out, and Mr. Nussbaum does not deny, he was in fact back in the United States and practicing law no later than July 28, 2016 and most likely by July 26. On July 28, Mr. Nussbaum physically attended a deposition in another proceeding that took place in Brooklyn, New York. See **Appendix C**, hereto, two emails from opposing counsel in that matter stating: (1) that Mr. Nussbaum attended the deposition in Brooklyn, and (2) that the deposition date was agreed to by Mr. Nussbaum in mid-June eliminating any possible excuse that he made an unexpected return to deal with this matter.

Indeed, it appears quite probable that Mr. Nussbaum was back home by July 26, 2016. That is what his out-of-office auto-reply said before he apparently changed it to August 11. See **Appendix D**, in which opposing counsel in another separate proceeding reported:

[13] As discussed below, even this auto-response appears to have been a lie.

> [B]elow you will see the "auto reply" response I received from Nussbaum after I emailed him on July 12th. It says his office would reopen on July 25th. That's a big difference – returning on July 25th versus returning on August 12th. Is it possible that this guy sets up different auto responses depending upon who emails him? Is that even possible?[14]

This mirrors my own experience. As the undersigned reported below, three emails sent to Mr. Nussbaum within the limited span of a few days received three very different responses – first, an auto-reply stating Complainants' Counsel would return on July 25, then an auto-reply stating Complainants' Counsel would return on August 11, then no auto-reply at all.[15]

We do not claim that this ethical breach was of the same magnitude as Counsels' repeated use of fraudulent documents, and Mr. Nussbaum has since said that even when he returned from Israel he was on vacation (other than the deposition). True or not, the obvious lack of candor with the Presiding Officer in connection with a request for a procedural advantage is questionable at best. What is especially troubling about this misrepresentation is how unnecessary it was. Had Mr. Nussbaum displayed candor to the undersigned and to the Presiding Officer – saying perhaps that he was traveling part of the time and would be on vacation at home or pressed by other matters upon his return – the undersigned would have consented as a matter of course and courtesy between counsel, and we expect the Presiding Officer would have granted the extension based on the truth as readily as upon a falsehood.

c. Violations of Model Rule 1.9(c)

[14] On July 26 Complainants submitted their response to the Presiding Officer's Order to Supplement the Record, signed by Mr. Nussbaum.

[15] So far as we are aware, this odd practice of changing one's auto-response is not in-and-of-itself unethical, but it certainly appears problematic when used in support of a lie or misleading statement to the tribunal.

Model Rule 1.9(c) states in pertinent part that "[a] lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a [current] client." Mr. Nussbaum flagrantly violated that Rule by knowingly submitting documents belonging to his former client Global in clear violation of an extant Protective Order issued by the United States District Court for the Eastern District of New York.[16] As these were clearly Global's documents, there appears to be no valid reason why Mr. Nussbaum would still have them in his possession. Furthermore, Mr. Kapustin alleges that Mr. Nussbaum has been using in this matter other non-public documents that he purloined from Global.[17]

d. <u>Violations Of Model Rule 1.8(b)</u>

Model Rule 1.8(b) mandates that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." Subject to the possibility of written, informed consent, Complainants' Counsel would appear to have violated this Rule.

Understanding this violation requires a little, rather simplified, background. The disputes between Empire and Global and between Global and its defrauded customers have spawned a cottage industry of legal proceedings, including the instant matter. In one such proceeding pending in the United Stated District Court for the District of New Jersey, the complainants have made claims for the value of many vehicles, including the very same vehicles at issue here.

[16] Mr. Nussbaum cannot possibly plead ignorance of the Protective Order, as he represented Global and Mr. Kapustin in the very proceeding in which it was issued.

[17] Kapustin Aff. Paras. 37 and 39. Counsel for Respondents has since the beginning of this proceeding expressed concern that Mr. Nussbaum's representation of Complainants necessarily raises a substantial issue under Rule Model 1.9(a) as to how he can now pursue litigation adverse to his former clients. As that is more Mr. Kapustin's issue than ours, however, we do not address it herein.

These cases thus have a direct, mutually-adverse effect upon each other. As the Presiding Officer has orally ruled, Empire cannot be required to pay double for the same vehicles, so whatever amount the first victor (if any) receives as compensation must be subtracted from the compensation available to the second victor. That means that there is a race to the finish line between Complainants here and plaintiffs in the DNJ action. If plaintiffs win their claim for all or part of the value of the four vehicles, then Complainants are out in the cold – they cannot receive such amount as reparations here. The New Jersey plaintiffs are subject to the same tension with Complainants – Complainants' gain would be their loss.

Despite this necessary and significant antagonism between the conflicting interests of Complainants here and plaintiffs there, counsel in the two cases have been cooperating in a way that benefits neither of their respective clients, but rather seems designed solely more likely that some damage will be assessed somewhere against Empire. On August 27, 2016, one of the attorneys for the New Jersey plaintiffs – Ms. Temkin – planted in that case a "Certification" that was prepared through a joint operation with Mr. Nussbaum.[18] See **Appendix E**. Indeed, the Certification reveals on its very face that it was prepared in coordination with, with and using documents from this proceeding provided by, Mr. Nussbaum.[19] Several days later, Complainants' Counsel attempted to file that very same Certification in this proceeding.

This raises substantial ethical questions about whom Mr. Nussbaum actually represents. His "clients" and those represented by Ms. Temkin are, as explained above, directly adverse to

[18] Ms. Temkin obviously had no legitimate reason to submit the Certification, other than as a pretext for use by Mr. Nussbaum, in the supposedly separate New Jersey litigation. It was imaginatively filed in purported connection with a motion to disqualify that had been filed in February – ***more than six months earlier***. And the emails referenced therein that the Certification reports on were all dated ***at least two (and generally more) months earlier***.

[19] The assistance supplied by Mr. Nussbaum included providing Ms. Temkin with mail sent to Mr. Nussbaum, and also making available to her filings herein not posted on the FMC website.

each another, so it seems passing strange that counsel for either would help the other at the expense of his/her own clients. Has Mr. Nussbaum explained this obvious conflict to his clients and received their written consent, as required by the Model Rules made applicable to Complainants' Counsel pursuant to FMC Rule 26? Although we are reluctant to believe in conspiracy theories, this latest tactic appears to support Mr. Kapustin's claim in the litigation now pending in the New Jersey district court that Complainants' Counsel and Plaintiffs' New Jersey counsel are less interested in representing their clients' interests than in carrying out a coordinated pincer attack against Empire. Attached hereto as **Appendix F** are two letters from Mr. Kapustin to the DNJ.

There must of course be some allowance for a lawyer's professional judgment as to what will best serve his or her clients. We thus do not challenge Mr. Nussbaum's decision to give up a slam-dunk case against Mr. Kapustin – against whom judgment has already been entered – in favor of a dubious claim against an entity (Empire) with which Complainants had no relationship. Here, however, Mr. Nussbaum's tactics seem plainly adverse to his clients' interests – assuming, as we do, that their interest is in receiving compensation for their asserted losses, rather than simply attacking Empire. By helping plaintiffs, Mr. Nussbaum is reducing the potential for recovery by those he purports to represent.

Moreover, the Certification is nothing more than an attack on Mr. Kapustin, whose Motion to Intervene in this proceeding remains pending. The substantive issues in this proceeding are: (i) whether Complainants can prove they were party to the transportation contract with Empire, (ii) whether Complainants paid Empire directly for the transportation, and (iii) whether Complainants' claim that Empire violated the Shipping Act when it declined to violate its shipping contract by making unauthorized release of the vehicles to Complainants,

rather than the designated consignee, can be squared with Commission precedent to the contrary. Accordingly, questions regarding Mr. Kapustin are of minimal moment here and so there seems no possible argument that this was a legitimate bargain designed to benefit Complainants' pursuance of their claims.

e. Violations of Model Rule 3.4(c)

Model Rule 3.4(c) forbids a lawyer to "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists." As demonstrated in Part III(C)(2) below, Complainants' Counsel have engaged in repeated knowing violations of multiple FMC Rules, and so have also repeatedly violated this Model Rule.

2. Violations of the FMC Rules

As discussed above, Complainants' Counsel began violating the Commission's Rules at the very outset, when they filed a Complaint itself asserting multiple claims that had absolutely no basis, much less a good faith basis, in fact or law. They have been violating the FMC's Rules, with accelerating frequency, ever since.

We cannot here catalog all of the transgressions committed by Complainants' Counsel. Instead, we focus on a couple of Rules that they have violated with regularity.[20]

a. Violations of Rule 71(c)

Rule 71(c), applicable to non-dispositive motions, states that a party "may not" file a reply to a response unless either the Presiding Officer requests such reply or the party obtains

[20] Complainants' Counsel have also continued to violate Rule 6(a) on a regular basis, by making assertions without any belief, much less a reasonable belief, that they are well grounded in fact. Among these reckless and unsupported assertions are: (i) the entirely groundless claim that the undersigned – who has neither met nor communicated with Mr. Kapustin -- wrote or edited papers submitted herein by Mr. Kapustin, (ii) the obviously specious claim that the undersigned requires a competency evaluation, and (iii) the patently false assertion that the undersigned improperly used a visit to his father's grave as a partial reason for requesting a brief extension of time.

leave based on a showing of "extraordinary circumstances." Complainants' Counsel have regularly flouted that requirement with obvious disregard for the Commission's Rules. For example:

1. On August 24, 2016, Complainants' Counsel filed a motion for leave to file a sur-reply regarding Respondents' motion for judgment on the pleadings, as to which briefing had ended a month earlier. After Respondents submitted a response in accordance with the Rules, Complainants' Counsel filed on August 31, 2016 an improper reply to that response. Nowhere in that response does it state that the pleading was requested by the Presiding Officer or justified by "extraordinary circumstances." Indeed, the phrase "extraordinary circumstances" appears nowhere in the reply. Respondents, as appropriate, filed a conditional response to that reply, arguing that the Presiding Officer should ignore Complainants' unauthorized filing (and the conditional response) or, if the Presiding Officer chose to accept Complainants' improper reply, also consider Respondents' response thereto due to demonstrated "extraordinary circumstances." On September 1, Complainants' Counsel brazenly submitted yet another (second) unauthorized reply, again with no request for leave or any mention of "extraordinary circumstances."

2. On August 30, 2016, Complainants' Counsel filed a motion to supplement the record, to which Respondents responded. On September 1, 2016, Complainants' again filed an unauthorized reply without any request for leave or any attempt to suggest "extraordinary circumstances."

3. On September 8, 2016, Complainants' Counsel submitted what on its face is said to be a "Reply to Respondents' Response to Complainants' Motion . . . ." Once again, there was no attempt to obtain leave, and no mention of any "extraordinary circumstances."

b. Violations of Rule 71(a)

Rule 71(a) provides that *before* filing a non-dispositive motion, the movant must (i) confer with opposing counsel to resolve or narrow the issues, and (ii) state within the body of the motion what attempt to confer was made. In all of the motions filed by Complainants' Counsel to date, they have only ***one*** made even the smallest effort to confer. That was Complainants' request for an extension wherein Mr. Nussbaum misrepresented his whereabouts. Even then, all Mr. Nussbaum did was send the undersigned a statement of his intent to make the motion in a few hours – not giving any reason for the lengthy delay and declining to do so when asked.

The two recent motions discussed just above – for leave to file a sur-reply and for leave to supplement the record, are only two of many instances where Complainants' Counsel blatantly ignored Rule 71(a) – neither attempting to confer nor making any report in the body of the motion (or elsewhere). We could easily cite many others.

D. <u>Incivility</u>

Although acts of incivility do not, in and of themselves, violate either the Model Rules or the Commission's Rules, they are contrary to the growing trend among jurisdictions and courts to foster civility, and certainly detract from the Commission's adjudicatory role.[21]

The undersigned understands quite well that litigation is something of a "contact sport," where each advocate zealously pursues the interests of his or her client. Further, the undersigned readily admits that he has, on occasion, been less temperate than his norm in this provoking proceeding. Nevertheless, there should be limits so that at least a modicum of civility and courtesy is preserved, and the Commission may wish to consider the extreme level of incivility displayed by Complainants' Counsel when deciding what to do regarding the ethical and procedural violations described above.

[21] The Bar of California, for example, has developed Guidelines of Civility and Professionalism, and the attorney oath now includes a pledge of civility. See California Rule 9.4.

Complainants' Counsel have in this proceeding routinely exceeded any conceivable limit on civility, both in their filings with the Commission and in their correspondence to opposing counsel. As such crudities do not directly violate any rule, we discuss only a few representative instances to give the Commission some flavor as to Counsel's level of discourse. We invite the Commission, however, to review Complainants' other filings in the FMC Docket to obtain a more fulsome picture. Needless to say, none of these claims included any supporting facts.

1. Complainant's September 2, 2016 "Status Report." Apart from being mischaracterized as a status report, this filing states such things as: (i) "Complainants have had a growing concern over Mr. Jeffrey's personal mental state, and competency to continue"; (ii) "complainants respectfully suggest that the Presiding Officer schedule a formal competency hearing in order to determine whether Mr. Jeffrey should be taken off this case"; (iii) Complainants "were compelled [to file the status report] due to Mr. Jeffrey's infantile, irrational, and unbalanced reaction [to a threatening email sent by Complainants' Counsel, described below]."

2. Complainants' September 8, 2016 Reply to Respondents' Response to Complainants' Motion. Apart from the obvious violation of Rule 719(c), this pleading is notable only for its personal attack on my colleague – Ms. Vohra (which I have referred to and continue to view as "cowardly").[22] Even though Messrs. Katz and Nussbaum are fully aware that nothing gets filed by Respondents in this matter without my full attention and review (and in most cases the bulk of the drafting), they deliberately chose to aim not at me, but at the more

[22] Mr. Nussbaum in response pointed to his apparently excellent military service, which we assume to be true. Honorable service of the country, however, does not excuse dishonorable service as an attorney or behaving like a schoolyard bully picking on those less able to defend themselves. My statement moreover, was about their conduct in that specific motion, not about their general level of physical courage.

junior member of the team, see e.g., (i) "Though signed by Mr. Jeffrey, said response bears the inimitable mark, poor grammar, inartful drafting, and "moot court" type writing style of Mr. Jeffrey's demonstrably incompetent junior associate, Ms. Vohra, as the most recent of similar incomprehensible writings of Ms. Vohra"; (ii) "once stripped of 'first year law student' Socratic inquiry, and other irrelevant legal-babble"; (iii) "complainants are well familiar with Ms. Vohra' s shocking lack of the first semblance of knowledge of *any* area of law pertaining to the litigation of this matter"; and (iii) "if anything or anyone is "confused" in this matter it is the hapless Ms. Vohra whose knowledge of the applicable law and the significance of the undisputed facts in this matter is as bereft as her legal writing skills." Ms. Vohra is of course none of these things, and the undersigned would happily match her abilities and knowledge against those of Complainants' Counsel, but that is not the salient point. No counsel of whatever quality should be subject to such gratuitous abuse in any respectable adjudicatory system.

3. <u>September 1, 2016 email from Mr. Nussbaum to the undersigned (attached as Appendix G).</u> On that date, I received the following unsolicited and entirely unnecessary email from Mr. Nussbaum incorporating what, under the circumstances, I considered and still consider to be a veiled threat:

> "Mr. Jeffrey,
>
> No matter how many frivolous submissions you make,
>
> nor [sic] matter how many Rules of Practice and Procedure you break,
>
> we will be watching you.
>
> ***Regards,***
>
> Marcus A. Nussbaum, Esq.
> P.O. Box 245599
> Brooklyn, NY 11224
>
> Tel: 888-426-4370
> Fax: 347-572-0439

http://www.nussbaumlawfirm.com/"

Although Mr. Katz and Mr. Nussbaum have tried to play this off as a "light-hearted" prank, due to its origins in a well-known pop song, I read it in a more ominous manner, especially given its unprecedented, "out of the blue" nature, as well as its relevance to nothing. Only after consultation with another lawyer did I conclude that it was arguably too ambiguous to warrant reporting to law enforcement.

4. September 9, 2016 email from Mr. Nussbaum to the undersigned (attached as Appendix H). On this date, Messrs. Nussbaum and Katz continued the barrage with another gratuitous threat as well as personal invective, this time in response to my request that they cease sending copies of their emails to Mr. Jeff Lesk, Managing Partner of Nixon Peabody's Washington, D.C. office, who is neither participating in this proceeding nor interested in such emails. That email included the following:

> "As Officers of the Court, and to the extent that it is our belief that you are unethically 'bilking' your client through the nonsense and rubbish that you have heaped upon this litigation through your incessant frivolous filings in this matter, which do *nothing* to advance your clients' hopeless defenses; and to the extent that same would not appear to be in the best interests of your client; together with ever-growing evidence of your own personal mental instability, and concerns over your competence to continue to represent your clients herein, we feel it is our duty to apprise Mr. Lesk, as Managing Attorney of all past, present and future examples of such behavior and conduct, and will therefore continue to do so.
>
> At the least, the foregoing will provide you with yet a further opportunity to bill your client, and to initiate additional frivolous motion practice beyond that with which you have already burdened the Presiding Officer, the Commission, and complainants' counsel; rest assured that your ability to continue to submit such frivolous filings is shortly to come to an end."

E. The Commission Should Issue Its Own Show Cause Order

When a matter is on exceptions before the Commission, the Commission has "all the powers which it would have in making the initial decision." Rule 227(a)(6). The Commission is

thus authorized to issue its own Order to Show Cause why Complainants' Counsel should not be subject to disciplinary action, rather than remand the matter to the Presiding Officer. We urge the Commission to take that path here. As explained above, the violations themselves are clear and numerous, and there is no need for the type of detailed fact development that might warrant a remand to the Presiding Officer.[23] Further, a remand will simply prolong the matter and thus reduce protection of the shipping public from lawyers unable to comply with their ethical and procedural obligations when practicing before the FMC.

Any such Show Cause Order should include Mr. Katz as well as Mr. Nussbaum. Although Complainants' Counsel like to pretend that all pleadings and communications come solely from the pen of Mr. Nussbaum, there are two distinct writing styles at play, and they are easily told apart. This is not only my experience, but also that of other counsel who have litigated against the duo in other cases.

Perhaps more importantly, to the extent that any discipline involves suspension or retraction of the privilege of practicing before the Commission, failure to include Mr. Katz would leave Mr. Nussbaum at liberty to continue practicing through Mr. Katz.

[23] Moreover, the Presiding Officer already has a lot on his plate with respect to this proceeding. Respondents' Motion for Judgment on the Pleadings remains pending, as do numerous ancillary motions.

CONCLUSION

If one bad apple can spoil the barrel, imagine what two can do. For the reasons above, Counsel for Respondents requests that the Commission reject the Presiding Officer's decision to deny jurisdiction and issue its own Order for Complainants' Counsel to Show Cause why they should not be subject to disciplinary action.

Respectfully submitted,

Eric Jeffrey
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202-585-8000

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Exceptions of Respondents' Counsel to the Presiding Officer's September 16 Decision not to Consider Disciplinary Action Against Complainants' Counsel by first class mail to the following:

Marcus A. Nussbaum, Esq.
P.O. Box 245599
Brooklyn, NY 11224
Marcus.nussbaum@gmail.com

Seth M. Katz, Esq.
P.O. Box 245599
Brooklyn, NY 11224

Dated at Washington, DC, this 11th day of October, 2016.

Eric Jeffrey
Counsel for Respondents